IN THE CIRCUIT COURT OF THE 11Th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Natalie Nichols,

Plaintiff,

v.

City of Miami Beach, Florida, et al.,

Defendant.
_____/

CIRCUIT CIVIL DIVISION
CASE NO.: 2018-21933 ca (22)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, Natalie Nichols ("Plaintiff" or "Nichols"), challenges two ordinances enacted by Defendant, City of Miami Beach, Florida ("Defendant" or "City"), which, with limited exceptions, ban short-term rentals of residential property. Nichols attacks these ordinances on three fronts. First, she insists that the ordinances are unconstitutional under the equal protection provisions of Article I, Section 2 of the Florida Constitution "because they prohibit the short-term rental of [her] properties, while allowing the short-term rental of "similarly situated properties." Second Amended Complaint, ("Complaint"), Count I. Nichols next claims that the ordinances violate Article I, Section 17 of the Florida Constitution, both facially and as applied, because they impose "grossly excessive punishment meant to deter people from peacefully using their property for home-sharing." Complaint, Count II. Finally, Nichols says that these Ordinances conflict with

Florida Statute Section 163.09(2)(d), which limits the fines municipalities may levy for code violations to "$1,000.00 per day for the first violation and $5,000.00 per day for repeat violations." Complaint, Count III.

Because the preemption claim advanced in Count III raises a purely legal and potentially dispositive issue, the Court directed the parties to file cross-motions for summary judgment directed to that claim only. The City filed its "Motion for Summary Judgment" ("Motion"), on March 28, 2019, and Plaintiff filed her "Cross-Motion for Summary Judgment" ("Cross-Motion") and opposition to the City's motion on April 26, 2019. On May 10, 2019 the City filed its "Reply in Support of its Motion for Summary Judgment" and response to Plaintiff's Cross-Motion. The Court entertained argument on September 10, 2019 and ordered limited supplemental briefing. The matter is now ripe for disposition.

II. UNDISPUTED RELEVANT FACTS

In recent years on-line platforms such as Airbnb and Homeaway have made it much easier for property owners to enter into short-term rentals. Many property owners do so in order to generate supplemental income and defray the cost of maintaining their real estate. Other property owners (and citizens who may not own property) are not as enamored with the emergence of this "industry," and believe that transient occupancy negatively impacts property values as well as the health, safety and welfare of their community.

After balancing these competing interests/concerns, the City – in the exercise of its police power – enacted two ordinances which for all practical purposes ban short-term rentals on Miami Beach. The first, codified at City Code § 142-905(b)(5), governs short-term rentals of single-family homes. The second, codified as City Code § 142-111, governs short-term rentals of townhomes, condominium, and apartments. Generally speaking, both ordinances prohibit the rental of properties for terms of six months or less, with limited exceptions that are not pertinent to the issues framed by the pending motions.

If a property owner rents for a period of less than six months and one day- and thereby violates either ordinance – they are subject to escalating fines of $20,000.00 for the first offense, $40,000.00 for the second, $60,000.00 for the third, $80,000.00 for the fourth, and $100,000.00 for all offenses thereafter. City Code §§ 142-905(b)(5)(a) and 1111(e)(1). These hefty (some might say exorbitant) fines are, in the City's view, necessary to impel compliance given the value (and corresponding rental income potential) of many properties located on Miami Beach. Chapter 30 of the City Code sets forth procedures for enforcement, and provides that a special master will hear Code violation disputes. A special master, however, has no ability to waive or reduce fines if a violation is found. City Code § 142.905(b)(5) ("the special master shall not waive or reduce fines").

Plaintiff owns two properties on Miami Beach, a single-family home located at 1531 Stillwater Drive that she has owned since 2004, and a "four-plex" located at 807 86th Street that she has owned since 2006. The former is covered by Ordinance §142-905(b)(5) and the latter by Ordinance 142-1111. Plaintiff alleges that she has "conducted short-term rentals" of both properties "in the past," and that "[b]ut for the City's prohibition on short-term rentals and extremely high fines, [she] would resume conducting short-term rentals on both properties." Complaint, ¶¶ 24-26.

III. THE PARTIES' POSITIONS

According to Plaintiff, Article I, Section 18 of the Florida Constitution limits all administrative fines to those authorized by the Florida Legislature," and no city may "adopt any fines that the legislature has not authorized it to adopt." Plaintiff's Cross-Motion, pp. 1, 3. Plaintiff then points out that Florida Statute § 162.09 "limits municipal fines to $1,000.00 for the first offense and $5,000.00 for subsequent offenses," Cross-Motion, p. 3, and insists that "these are the highest fines that any city may impose for property code violations." Cross-Motion, p. 5. Put simply, Nichols says that the ordinances conflict with state law and must therefore yield.

The City disagrees. In its view, Chapter 162 permits a municipality to "adopt an alternate code enforcement system," including one that imposes higher fines than those statutorily authorized. Motion, p. 4. This is so – according to the City – because § 163.03(2) and § 162.13 grant it a right to "opt-out" of Chapter 162

altogether and, if it does, impose *any* fine it desires, with no limitation other than excessive fines clauses of the United States and Florida Constitutions. In response, Plaintiff argues that the City's interpretation of these provisions (§ 162.03(2) and §163.13) is "unsupported by law or logic" and, if embraced by this Court, would render § 162.09's statutory caps "meaningless." Cross-Motion, pp. 3, 6. In Plaintiff's view, § 162.03 grants a municipality the authority to adopt alternate "enforcement *procedures*" different than those provided for by Chapter 162 but does not authorize it to jettison § 162.09's statutory limitations on penalties. Cross-Motion, p. 9.

Putting aside its reliance on § 162.03 and §162.13, the City alternatively argues that its "Ordinances do not conflict with section 162.09(2)(d)" because statutory fees are *per-day*, whereas the fines prescribed in the Ordinances are *per-violation*." Motion, p. 10. As a result, under certain hypothetical scenarios the fines imposed by the ordinances could turn out to be less than the fines permitted by the statute. In these scenarios the fine imposed by the ordinance would – in the City's opinion – "be consistent with Chapter 162, because it [would] 'not exceed' the fine set forth in § 162.09(2)(d)." Motion, p. 11. Plaintiff responds by pointing out that the statutory fine of $1,000.00 per day will not "catch up" to the City fine for day one (1) (*i.e.*, the first violation) until day twenty (20), and that the City itself, in enacting the ordinances, recognized the "need for more substantial penalties" than

those provided by the statute in order to deter non-compliance. Cross-Motion, p. 12.

Finally, the City insists that Nichols has no standing to bring this claim because she does not allege that "the challenged fine structure" has been "enforced against" her. Motion, p. 11. The City, however, does not dispute that fact that Nichols is prohibited by the Ordinance from renting her property short-term, or that she is subject to a $20,000.00 (and the escalating) fine if she does.

IV. ANALYSIS

A. The City's Alternative Arguments

Before addressing the only legitimate issue here, the Court will quickly dispose of the City's alternative arguments, neither of which need detain it long. First, the City's claim that its Ordinances do not actually conflict with § 162.09(2)(d) strains credulity. The statute permits a fine of $1,000.00 per day. A property owner who violates the City's Ordinance for one day is fined $20,000.00. If someone violates the code twice by renting another time, again for just one day, the statutory fine is $5,000.00. The fine imposed by the Ordinance for that one day second offense is $40,000.00. The Court could go on and on, but it will suffice to say that it is patently obvious the fines a violator is exposed to are markedly different under the statute and ordinances, and the fact that in *some* hypothetical scenario the

statutory fine could amount to more than the fine specified in the ordinance is of no consequence.

Also devoid of merit is the City's argument that Nichols lacks standing to seek declaratory relief because she has not violated the ordinances and been penalized. Plaintiff is a property owner on Miami Beach who has – and wants to continue – leasing her real estate, but she is unable to do so because the challenged ordinances make it illegal. No precedent supports the proposition that she must first break the law and be fined $20,000.00 before she can challenge its legality. The law is in fact to the contrary, as it should be. *See, e.g., Lambert v. Justus*, 335 So. 2d 818 (Fla. 1976) (property owners had standing to bring "complaint seeking declaratory judgment as to the validity of certain restrictions on the use of their property"). These ordinances are prohibiting Nichols from renting her property *now*, and unlike the situations presented in the precedent cited by the City, this is not a case where a plaintiff is seeking an advisory opinion on a moot academic issue or a question that may *never* arise. *See, e.g., Santa Rosa County v. Admin. Com'n, Div. of Admin. Hearings*, 661 So. 2d 1190 (Fla. 1995) (action seeking declaration as to the constitutionality of certain statutes was moot as parties had resolved their disputes by a "stipulated settlement agreement"); *Apthorp v. Detzner*, 162 So. 3d 236 (Fla. 1st DCA 2015) (action challenging the qualified blind trust statute despite the fact that "no public officers" had ever used the type of trust authorized by the law);

Florida Dept. of Ins. v. Guarantee Tr. Life Ins. Co., 812 So. 2d 459 (Fla. 1st DCA 2002) (action challenging constitutionality of Florida Statute § 627.411 presented no actual controversy because plaintiffs rate filings had never been reviewed or denied "under that provision").

B. Does Chapter 162, et. seq. Grant Municipalities the Right to Opt-Out of the Statutory Cap on Fines Imposed by § 162.09

This brings the Court to the only genuine issue: Does Chapter 162 authorize the City to impose fines greater than those authorized by §162.09? The short answer is no.

1. Municipality Ordinances are Inferior to, and must Yield to Conflicting State Law

"[A] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972). For that reason, "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993). That does not mean that the state and a municipality may not legislate concurrently. They can. But when a municipality legislates in an area addressed by the legislature, its "concurrent legislation must not conflict with state law." *Id.*, citing *City of Miami Beach v. Rocio Corp.*, 404 So.2d 1066 (Fla. 3d DCA), *review denied*, 408 So.2d 1092 (Fla.1981). *See also, City of Palm Bay v. Wells Fargo Bank, N.A.*, 57

So. 3d 226 (Fla. 5th DCA 2011) ("[a]lthough a municipality has broad home rule powers to enact local ordinances, the ordinances may not conflict with a state statute") (internal citations omitted).[1]

This long-settled rule of superiority/preemption is derived from the plain text of Article I, Section 18 and Article VIII, Section 2(b) of our Constitution. The first provides that no administrative agency – which the City admittedly is – may impose any penalty "except as provided by law." Article I, Section 18, Fla. Constitution. The second provides that municipalities "may exercise any power for municipal purposes except as otherwise provided by law." Article VIII, Section 2(b), Fla. Constitution. These provisions, in tandem with the "Municipal Home Rule Powers Act" codified at Chapter 166 of the Florida Statutes, make clear that a municipality "may enact legislation on any subject upon which the state legislature may act unless expressly prohibited by law." *Rocio Corp.*, 404 So. 2d at 1068; *City of Venice v. Valente*, 429 So. 2d 1241, 1243 (Fla. 2d DCA 1983) ("... a municipality may not exercise any power for municipal purposes which is expressly prohibited by law"). Local ordinances are "expressly prohibited by law" when they conflict with a state statute, and "must fail when [such] conflict arises." *Id. See also City of Kissimmee v. Florida Retail Fed'n, Inc.*, 915 So. 2d 205 (Fla. 5th DCA 2005) ("[w]hen the

[1] Contrary to the City's argument – raised for the first time in its "Supplemental Memorandum" – this rule is not relaxed merely because a local government exercises its powers pursuant to a Home Rule Charter authorized by Article VII, Section 11(b) of the Florida Constitution. *Florida Retail Fed'n, Inc. v. City of Coral Gables*, 44 Fla. L. Weekly D2089 (Fla. 3d DCA Aug. 14, 2019). Rather, it is "well-established that the Home Rule Amendment must be strictly construed to maintain the supremacy of general laws." *Id.*

legislature enacts a statute, a local government cannot adopt or enforce an ordinance that conflicts with the statute"); *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008) (" ... in a field where both the State and local government can legislate concurrently, a county cannot enact an ordinance that directly conflicts with a state statute"); *Hillsborough County v. Florida Rest. Ass'n, Inc.*, 603 So. 2d 587 (Fla. 2d DCA 1992) ("[i]f [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void"); *Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014) ("... municipal ordinances must yield to state statutes"); *Florida Retail Fed'n, Inc., supra,* n.1.[2]

Recognizing that it cannot credibly challenge the general proposition that local governments may not enact ordinances in conflict with state law, the City argues that Chapter 162 itself grants municipalities a right to opt-out of all its provisions, including § 162.09's caps on fines. The Court disagrees.

2. Chapter 162

Chapter 162, titled the "Local Government Code Enforcement Boards Act," is intended to:

> ... promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing

[2] The Court notes that in 2011 the legislature decide to preempt the subject matter of short-term rentals by precluding local legislation banning them. *See* Florida Statute § 509.032(7)(b) ("[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals"). Because the City was grandfathered in the statute, it is not precluded from regulating short-term rentals under principals of general subject matter preemption, which apply when the State "essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." *Phantom of Brevard, Inc,* 3 So. 3d at 314. But even when an area is not completely preempted, a municipality again may not "enact an ordinance that directly conflicts with a state statute." *Id.*

> the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist.

§ 162.02, Fla. Stat. Ann. The Act grants local government the power to "appoint one or more code enforcement boards" comprised of "residents of the municipality, in the case of municipal enforcement boards, or residents of the county, in the case of county enforcement boards. § 162.05(1)-(2), Fla. Stat. (2019). The Act then establishes an "enforcement procedure" to be followed whenever a code inspector becomes aware of a violation. § 162.06, Fla. Stat. (2019). Section 162.07 of the Act provides for hearings to be conducted by the appointed code enforcement board, and "[i]f the local governing body prevails," authorizes the board to award "all costs incurred in prosecuting the case before the board and such costs may be included in the lien authorized under s. 162.09(3)." *Id.*

Section 162.09 of the Act – titled "Administrative fines; costs of repair; liens" then caps the fines that may be imposed by a code enforcement board or special magistrate. Section 2(d) – the portion of the Act at issue here – provides:

> (d) A county or a municipality having a population equal to or greater than 50,000 may adopt, by a vote of at least a majority plus one of the entire governing body of the county or municipality, an ordinance that gives code enforcement boards or special magistrates, or both, authority to impose fines in excess of the limits set forth in paragraph (a). Such fines shall not exceed $1,000 per day per violation for a first violation, $5,000 per day per violation for a repeat violation, and up to $15,000 per violation if the code enforcement board or special magistrate finds

> the violation to be irreparable or irreversible in nature. In addition to such fines, a code enforcement board or special magistrate may impose additional fines to cover all costs incurred by the local government in enforcing its codes and all costs of repairs pursuant to subsection (1). Any ordinance imposing such fines shall include criteria to be considered by the code enforcement board or special magistrate in determining the amount of the fines, including, but not limited to, those factors set forth in paragraph (b).

§ 162.09, Fla. Stat. (2019). This statute is plain and unambiguous, limiting fines to the amounts specified, but allowing enforcement boards to impose "additional fines" to cover *only* enforcement costs and repairs.

Undettered the clarity of § 162.09's command, the City again says the caps imposed by this statute are not applicable here because it has elected to opt-out of Chapter 162 altogether. In support of its claimed ability to do so, the City relies upon § 162.13 and 162.03(1) and (2). Secion 162.13 provides that:

> It is the legislative intent of ss. 162.01-162.12 to provide an additional or supplemental means of obtaining compliance with local codes. Nothing contained in ss. 162.01-162.12 shall prohibit a local governing body from enforcing its codes by any *other means*.

Id. (emphasis added). Similarly, § 162.03(1) and (2) provide:

> (1) Each county or municipality may, at its option, create or abolish by ordinance local government code enforcement boards as provided herein.
>
> (2) A charter county, a noncharter county, or a municipality may, by ordinance, adopt an *alternate code enforcement system* that gives code enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances. A special magistrate shall have the same status as an

> enforcement board under this chapter. References in this chapter to an enforcement board, except in s. 162.05, shall include a special magistrate if the context permits.

Id. (emphasis added).

Neither of these provisions, as plainly worded, bestow upon local governments authority to opt-out of the caps on fines dictated by § 162.09. The City, however, insists that such a right is embedded in § 162.13, which authorizes a municipality to enforce its code by "means" other than enforcement boards, and § 162.03, which grants municipalities the authority to "adopt an alternate enforcement system." Application of well settled principles of statutory construction proves this contention wide of the mark.

3. Applicable Principles of Statutory Construction

The first rule of statutory construction is to read the statute, then read it again, for "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) (quoting *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). As our appellate court recently put it, "[t]he Legislature must be understood to mean what it has plainly expressed," and when a statute "is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." *DMB Inv. Tr. v. Islamorada, Vill. of Islands*,

225 So. 3d 312, 317 (Fla. 3d DCA 2017). Statutes must be enforced as written because courts are "'without power to construe an unambiguous statute in a way which would extend, modify, or *limit,* its express terms or its *reasonable and obvious implications.* To do so would be an abrogation of legislative power." *Holly,* 450 So.2d at 219.

Section 162.09's mandate is no doubt clear and unambiguous. The question then becomes whether the provisions relied upon by the City (§ 162.03 and § 162.13) clearly and unambiguously grant local government the "option" to circumvent that mandate and impose larger fines so long as they use "other means," or an "alternate code enforcement system," rather than code enforcement boards. Not surprisingly, Chapter 162 does not define the word "means" or illuminate upon the phrase "alternate code enforcement system." The Court must therefore look to, and apply, ordinary definitions which may be derived from dictionaries. *See Dudley v. State*, 139 So. 3d 273 (Fla. 2014); *E.A.R. v. State,* 4 So. 3d 614 (Fla. 2009). A simple google dictionary search reveals that the word "means," when used as a noun, is defined as an "action or system by which a result is brought about," and is synonymous with "way," "manner," "process," "procedures," "avenue," or "course." Similarly, a "system" is defined as a "mechanism or interconnecting network," and is synonymous with "arrangement," and "scheme." *See* Dictionary.com.

Applying the ordinary meaning of these terms, the Court concludes that § 162.03(2) and §162.13 do no more than give local governments the authority to use methods or procedures other than the code enforcement board protocol authorized by Chapter 162. Neither provision says – or in the Court's view suggests – that a municipality may impose fines greater than those specified in § 162.09. Rather, the term "other means" contained in § 162.13, and the phrase "alternate code enforcement system" in §162.03(2), refer to "methods," "ways" or "procedures" that a municipality may use to enforce its code in lieu of the enforcement boards authorized by the Act. *See, e.g., Goodman v. County Court in Broward County, Fla.*, 711 So. 2d 587, 588-589 (Fla. 4th DCA 1998) (section 162.13 grants cities the right to have code violations prosecuted in "county court rather than through the code enforcement board," as the "City may elect either *method* of prosecution") (emphasis added). These statutes do not expressly or by reasonable implication grant municipalities the power to "opt-out" of the caps specified in § 162.09. *See Paul v. State*, 129 So. 3d 1058, 1064 (Fla. 2013) ("[w]hen a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction…").

Even if these statutory provisions were open to alternative interpretations (*i.e.*, ambiguous), the result here would be the same applying other well settled rules of statutory construction. To ascertain legislative intent when a statute is found to be

ambiguous, courts consider a variety of factors "including the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters. *American Badaraco v. Suncoast Towers V Associates*, 676 So. 2d 502, 503 (Fla. 3d DCA 1996) (citing *American Bakeries Co. v. Haines City,* 180 So. 524, 532 (1938). The Court also must examine the statute as a "cohesive whole," *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000), so as "to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914–15 (Fla. 2001). *See also Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ('statute also must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts").

An examination of Chapter 162 as a "cohesive whole" only further persuades the Court that the legislature did not intend to set strict statutory caps on the amount of fees that may be levied by a municipality for a code violation and then, in the same breath, make those mandatory caps optional. The purpose of Chapter 162 is to improve "the health, safety and welfare of the citizens" by "authorizing the creation of administrative boards with authority to impose administrative fines," as the legislature determined that procedure would "provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in ...."

§ 162.02 Fla. Stat. (2019). Thus, the *primary* purpose of the statute is to provide local governments a *procedure* available to enforce local law. The Legislature, however, decided to impose a limit on the fines that municipalities such as the City could levy for code violations, regardless of whether the fines are imposed by "code enforcement boards or special magistrates, or both..." § 162.09(2)(d), Fla. Stat. (2019). This statute commands – in plain and clear English – that such "fines shall not exceed $1,000 per day per violation for a first violation, $5,000 per day per violation for a repeat violation, and up to $15,000 per violation if the code enforcement board or special magistrate finds the violation to be irreparable or irreversible in nature." *Id.*

Given that the principle purpose of the Act is to provide local government with a *procedural* mechanism to enforce local law, the Legislature decided that this authorized procedural mechanism (*i.e.*, the enforcement board protocol) was "an additional or supplemental means of obtaining compliance," and that local governments were free to enforce codes by "other means," § 162.13, Fla. Stat. (2019), or – put another way – by adopting "an alternate code enforcement system." § 162.03(2). These two provisions are simpatico. They give local government authority to use other methods or procedures of enforcement and are consistent with the Act's substantive provision capping the amount of fines a municipality may levy for a code violation. Put simply, § 162.03, 162.09, and 162.13 are easily

harmonized. *See Woodgate Dev. Corp. v. Hamilton Inv. Tr.*, 351 So. 2d 14 (Fla. 1977) ("…. it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act"); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987).

Conversely, the City's argument renders §162.09 completely meaningless. According to the City, the Legislature set strict mandatory caps on the amount local government can fine a citizen for a code violation and then, in the same Act, gave those local governments the authority to avoid them altogether by simply using special magistrates or hearing officers instead of code enforcement boards. *See* § 162.03, Fla. Stat. (2019). This proposition is implausible, as every municipality wishing to do an end-run around the statutory caps will simply "choose" to use an enforcement method other than an enforcement board, rendering § 162.09 subject to being eviscerated by the stroke of a pen. *See, e.g., Johnson v. Feder*, 485 So. 2d 409 (Fla. 1986) ("[w]e are compelled by well-established norms of statutory construction to choose that interpretation of statutes … which renders their provisions meaningful").

The City's argument also is belied by § 162.03(2) itself, which provides that a "special magistrate" (*i.e.*, a non-enforcement board option) shall have the same status as an enforcement board under the chapter." *Id.* Why then would an enforcement board be bound by the statute's caps, whereas a special magistrate or

hearing officer would not? There is no conceivable rationale for an interpretation of Chapter 162 that would limit an enforcement board's ability to impose fines to $1,000.00 per day, while allowing special magistrates or hearing officers to impose any fine authorized by an ordinance, no matter how large, and the City's tortured reading of §162.03 and § 162.13 expands these provisions to say something they simply do not say; namely, that local governments may "opt-out of Chapter 162 altogether" or "opt-out the caps imposed by § 162.09." Had the Legislature intended to grant municipalities those rights, it easily could has said so. It did not, and the Court will not expand § 162.03 and § 162.13 by interpreting them as granting local governments opt-out rights by implication. *See, e.g., Holly, supra* at 450 (courts are "powerless" to extend, modify or limit the terms of a statute).

4. Precedent Applying Chapter 162

In support of its claim that the statutory caps imposed by § 162.09 are completely optional, the City relies upon two decisions out of our appellate court: *Miami-Dade County v. Brown*, 814 So. 2d 518 (Fla. 3d DCA 2002) and *Verdi v. Metro. Dade County*, 684 So. 2d 870 (Fla. 3d DCA 1996). Neither provide it comfort.

Brown involved an appeal of findings made, and a penalty imposed by, a Hearing Officer after Miami-Dade County issued a civil violation notice to a property owner. While the property owner admitted the violation, he "defended on

the ground that he never received any prior warning and that the violation was remedied." *Brown*, at 518. The circuit court, sitting in its appellate capacity, "reversed the Hearing Officer" because it was "persuaded by its reading of sections 162.06 and 162.09 which appear to require notice and a time-to-cure period." *Id.* at 519. In the circuit court's view, the enforcement procedures adopted by the county (Chapter 8CC) collided with these statutory provisions because, unlike the statutes, "Chapter 8CC does not require notice of the violation, nor an opportunity to cure the violation prior to the imposition of the fine." *Id.*

Granting *certiorari*, our appellate court noted that "Chapter 8CC sets forth the procedure the County must follow in enforcing civil violations," and does not "require the County to give a grace period for curing the violation ...." *Id.* at 520. Rather, "Chapter 8CC makes it clear that the Code permits imposition of the fine without prior notice and/or an opportunity to first cure the violation." *Id.* This was permissible because § 162.03 confers on local government the authority to adopt an alternate enforcement system, and the County had done so. *Id.* at 519.

Brown is consistent with this Court's reading of Chapter 162, as the case involved a *procedural* difference between the alternate code enforcement system adopted by the County and the provisions of § 162. The City nevertheless highlights language in *Brown* stating that "Florida Statutes § 162.02, confers on local government the authority to either adopt Chapter 162, or completely abolish Chapter

162 and adopt an alternative code enforcement system." *Brown* at 519. That language, while admittedly expansive, is complete *obiter dicta*, as the *Brown* court was not called upon to decide the issue presented here. Rather, the narrow issue presented was whether the absence of a notice/opportunity to cure provision in Chapter 8CC conflicted with the procedural requirements of Chapter 162- nothing more. *See, e.g., Myers v. Atl. Coast Line R. Co.*, 112 So. 2d 263 (Fla. 1959) (part of opinion containing "ancillary and nonessential gratuitous statements" which are not necessary to the disposition of the case are "obiter dicta").

Verdie also provides no support for the City's claimed entitlement to "opt-out" of § 162.09's statutory caps. The case involved a putative class action "seeking a declaration that jurisdiction to entertain past code violations rested solely with the county court and not administrative hearing officers." *Verdi,* 684 So. 2d at 872. The plaintiff in *Verdi* argued that Chapter 162 authorized the "creation of administrative proceedings to address only pending or repeat code violations and not past violations" and, as a result, only county courts were empowered to "punish past code violations." *Id.* Rejecting this claim, our appellate court concluded that "Chapter 162 is not limited solely to compelling pending or repeat violators to comply with the Code," and that the statute "expressly" conferred upon the County the authority to adopt a "a completely alternative code enforcement system to permit either a code enforcement board or an administrative hearing officer to conduct hearings and

assess fines for code violations." *Id.* at 873. The Court therefore found "that the County was authorized to enact Chapter 8CC ... to provide administrative hearings before hearing officers for contested code violations. *Id.*

Verdi, like *Brown,* did not address the issue presented here, as neither case involved fines levied in excess of those sanctioned by § 162.09. *Brown* simply addressed a procedural difference between the statute and ordinance (*i.e.*, notice/opportunity to cure), and *Verdi* addressed the constitutionality of Chapter 162 and the question of whether, as matter of statutory construction, the Act was limited to addressing "only pending or repeat code violations and not past violations." *Verdi*, 684 so. 2d at 872. In contrast, the Second District's decision in *Stratton v. Sarasota County*, 983 So. 2d 51 (Fla. 2d DCA 2008) is (or very close to) a proverbial "red-cow" supporting the Court's interpretation of the Act.[3]

Stratton involved a home that was designed by a famous architect in 1970. The new owner sought to have the home designated a historic landmark—which would have allowed her to make needed repairs. She also sought zoning variances that would have achieved the same purpose. Both applications were denied because "erosion of the shoreline continued, and the house began literally crumbling into the Gulf of Mexico. At that point, because the house constituted a hazard to beachgoers, the County declared the house to be an imminent threat to public safety." *Id.* at 53.

[3] A "red cow" is a term proverbially used to describe a case directly on point, a commanding precedent. *See Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993).

The County then obtained an emergency demolition order, had the structure demolished, and placed a $129,315 lien on the property.

Challenging the lien imposed by the County for "payroll expenses" the property owner argued – just as Plaintiff does here—that Chapter 162 dictated which fines, costs, and expenses a city or county can recover as part of a code-enforcement action. *Id.* at 54-55. Since that chapter does not allow for the recovery of a county's payroll costs related to a demolition, the property owner in *Stratton* argued that the County could not recover those expenses. *Id.* at 55 -57. In response, the County argued that it was "relying on its local code provisions rather than the provisions of chapter 162 to collect these payroll expenses," *Id.* at 55, and because it had "created an alternative system of enforcement" it was not bound by the limitations found in Chapter 162. Mot. at 13-14. The question in *Stratton* was therefore identical to the one presented *sub judice.* Does the fact that a city may adopt different code-enforcement procedure than those provided in Chapter 162 also mean that it may impose fines and penalties that exceed the parameters set by the statute?

The *Stratton* court said no, emphasizing that under the Florida Constitution "the County has no authority to impose penalties that are not authorized by law." *Id.* at 55. The court then held that "the County cannot rely on local code provisions to collect these expenses in contravention of the authorized penalties set forth in

chapter 162." *Id.*; *see also* Op. Att'y Gen. Fla. 2000 -53 (2000) (Section 162.09(2) "establishes a range in which reasonable fines may be assessed" even for cities choosing procedures other than those authorized by Chapter 162). In short, *Stratton* rejected the exact argument that the City is making here, and the case is – in the Court's view – on point (or close enough) and arguable controlling. *See, e.g., Pardo v. State,* 941 So. 2d 1057 (Fla. 2006) (absent "interdistrict conflict, district court decisions bind all Florida trial courts").

V. CONCLUSION

The City – exercising its police power – decided to ban virtually all short-term rentals on Miami Beach. That is a policy decision the Court may not second guess or interfere with. *See* Benjamin N. Cardozo, The Paradoxes of Legal Science, 125 (1928) ("[w]hen the legislature has spoken, and declared one interest superior to another, a court must subordinate her personal belief to that so declared"); *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) ("... we have said time and again, the making of social policy is a matter within the purview of the legislature—not this Court"). But a municipality exercising its admittedly "broad authority to enact ordinances," *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006), may not legislate "in conflict with state law." *Thomas,* supra at 470. As our appellate court put it as recently as this August, "although Florida municipalities are given broad authority

to enact ordinances, municipal ordinances must yield to state statutes. *Florida Retail Fed'n, Inc., supra.*

The legislature – in the exercise of *its* police power – clearly and unambiguously imposed caps on the amount local governments may fine citizens for code violations. § 162.09, Fla. Stat. (2019). Those *mandatory* caps provide statewide uniformity and limit the exposure a citizen may face for violating local law. The caps set by the legislature, while hardly *de minimis*, may not in the City's view be adequate to force (or motivate) Miami Beach's wealthiest property owners to comply with these ordinances. The City may (or may not) be correct, but that is a matter it must take up in Tallahassee. In the meantime, and unless and until the legislature allows local governments to fine citizens in excess of $1,000.00 per day for code violations, the City must abide by the command of §162.09. *See Rocio, supra* at 1071 ("... the local ordinances must yield to state statutes if stability in government is to prevail"); *Thomas, supra* at 470 ('[w]hile a municipality may provide a penalty less severe than that imposed by a state statute, an ordinance penalty may not exceed the penalty imposed by the state").

The ordinances challenged here are in jarring conflict with § 162.09 and are therefore illegal and unenforceable.

For the foregoing reasons, it is hereby **ORDERED:**

1. The City's "Motion for Final Summary Judgment on Count III of the Second Amended Complaint" is **DENIED.**

2. Plaintiff's "Cross-Motion for Summary Judgment on Count III of the Second Amended Complaint" is **GRANTED**. The Court, pursuant to Chapter 86 of the Florida Statutes, declares City of Miami Beach Ordinances § 142-905(b)(5) and § 142-1111 in conflict with State law, illegal and unenforceable.[4] The City is hereby enjoined from enforcing either of said ordinances.[5]

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 7th day of October, 2019.

MICHAEL A. HANZMAN
Circuit Court Judge

Copies furnished to:

Christina Sandefur, Esquire
Matthew R. Miller, Esquire
Joseph S. Van de Bogart, Esquire
Aleksandr Boksner, Esquire
Enrique Arana, Esquire

[4] The Court notes that the City has – in other contexts – routinely imposed fines only up to the limit authorized by § 162.09. *See, e.g.,* City Code Sec. 30-74(d). In doing so it has exercised the right afforded by §162.09(2)(d) due to its population. This appears to be the *only* instance where the City has attempted to impose fines/penalties in excess of those authorized by the statute.

[5] The Court declines the City's invitation to sever the penalty provisions from the remainder of these ordinances, and notes that the City is free to enact replacements so long as they are constitutional and do not conflict with state statutory law.